Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd

SUPREME COURT (KUCHING) — CIVIL APPEAL NO 02–29–90
ABDUL HAMID OMAR LP, JEMURI SERJAN CJ (BORNEO) AND MOHAMED YUSOFF SCJ
29 MAY 1992

Civil Procedure *— Action — Commencement — Originating summons — Allegation of fraud — Inconsistencies in affidavits — Conflicts in evidence — Continuation of proceedings as if begun by writ — Rules of the High Court 1980 O 28 r 8(1)*

In this case a company, Har Lee Enterprise Sdn Bhd ('HLE'), had been incorporated under the Companies Act 1965 ('the Act'). By an agreement the first appellant and another person bought over all the shares of HLE. The first and second appellants were appointed managing director and secretary of the board of directors respectively. HLE was the registered proprietor of a piece of land at Kuching Town which was its only principal asset. The respondents entered into two building contracts with HLE for the construction and completion of foundation and basement works of a complex proposed to be built on the said land. A dispute arose between the respondents and HLE on completion of the said works and this was referred to arbitration. Under the arbitration award HLE was to pay the respondents the sum of $4,165,145.80 and costs. The respondents were not paid for their works and, in order to seek payment, they applied for the examination of the first and second appellants as responsible officers of HLE. As a result of facts unearthed by the examination the respondents took out an originating summons under O 88 r 2 of the Rules of the High Court 1980 ('RHC') in an application under s 304(1) of the Act seeking, inter alia, declarations that: the business of HLE has been carried on with intent to defraud creditors; and the first and second appellants be personally responsible, without any limitation of liability, for all of the debts or other liabilities of HLE.

The learned judge held that the provisions of s 304 of the Act were satisfied and accordingly made the order in terms of the originating summons (see [1990] 2 MLJ 440). The appellants appealed. On appeal it was submitted for the appellants, inter alia, that the learned trial judge erred in law in dealing with the application summarily by an originating summons under O 88 r 2(1) when he should have resorted to O 28 r 8(1) of the RHC, especially in the light of the plea of fraud and the conflicting affidavit evidence.

Held, allowing the appeal:

(1) Apart from the various inconsistencies in the affidavits of the appellants and respondents in the court below, there were other matters which had not been satisfactorily explained in the affidavits and could be resolved if the proceedings had been begun by writ.

(2) The conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidence which, however, was not possible in proceedings begun by originating summons. In any case it was most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence.

(3) In such a case as the present where fraud or intention to defraud was the central issue, particulars of fraud must be specifically pleaded and it was obvious that such particulars were absent in the affidavit of the manager of the respondent company.

(4) The matter was dealt with in a very unsatisfactory and summary manner, thereby causing grave injustice to the appellants.

(5) In light of the view taken by the court and the uncertainties of the various facts as were made available to the court, and in view of the authorities cited, the better decision was to allow the appeal, and pursuant to O 28 r 8(1) of the RHC order the proceedings to continue as if begun by writ, and the parties to deliver their pleadings in accordance with O 18 of the RHC.

[Bahasa Malaysia summary

Di dalam kes ini sebuah syarikat, Har Lee Enterprise Sdn Bhd ('HLE'), telah diperbadankan di bawah Akta Syarikat 1965 ('Akta itu'). Mengikut perjanjian perayu pertama dan seorang yang lain telah membeli semua saham HLE. Perayu pertama dan perayu kedua masing-masing telah dilantik sebagai pengarah urusan dan setiausaha lembaga pengarah syarikat itu. HLE adalah tuan punya berdaftar sekeping tanah di Bandar Kuching yang menjadi aset utama syarikat itu. Responden telah mengikat dua kontrak pembinaan dengan HLE untuk pembinaan dan penyelesaian kerja-kerja asas dan tingkat bawah tanah kompleks yang dicadangkan di bina atas tanah itu. Suatu pertikaian telah timbul antara responden dan HLE selepas penyelesaian kerja-kerja tersebut dan ini telah dikemukakan untuk ditimbang tara. Di bawah award timbang tara itu HLE dikehendaki membayar jumlah wang sebanyak $4,165,145.80 dan kos. Responden tidak dibayar bagi kerja-kerjanya itu dan, dengan tujuan untuk menuntut pembayaran, ia telah memohon pemeriksaan perayu pertama dan kedua itu sebagai pegawai bertanggungjawab HLE. Akibat fakta-fakta yang terbongkar di pemeriksaan itu, responden telah mengeluarkan satu saman pemula di bawah A 88 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dalam suatu permohonan di bawah s 304(1) Akta itu menuntut, antara lain, deklarasi berikut bahawa: perniagaan HLE telah dijalankan dengan tujuan memfraud pemiutang; dan perayu pertama dan kedua bertanggungjawab secara peribadi tanpa apa-apa had liabiliti terhadap semua hutang dan liabiliti yang lain HLE.

Hakim yang arif telah memutuskan bahawa peruntukan s 304 Akta itu telah dipenuhi dan oleh kerana itu telah membuat perintah seperti dikehendaki dalam saman pemula itu (lihat [1990] 2 MLJ 440). Perayu telah membuat rayuan. Di dalam rayuan telah dihujahkan

bagi pihak perayu, antara lain, bahawa hakim yang arif telah tersilap dari segi undang-undang dengan memutuskan permohonan itu secara terus melalui saman pemula di bawah A 88 k 2(1) sedangkan beliau seharusnya menggunakan A 28 k 8(1) KMT, lebih-lebih lagi memandangkan pli fraud dan keterangan afidavit yang bercanggah.

Diputuskan, membenarkan rayuan itu:

(1) Selain berbagai-bagai butir yang tidak konsisten dalam afidavit perayu dan responden di mahkamah di bawah, terdapat perkara lain yang tidak diterangkan dengan memuaskan dalam afidavit dan boleh diselesaikan jika prosiding itu telah dimulakan dengan writ.

(2) Percanggahan keterangan boleh hanya diselesaikan dengan betul dan memuaskan jika keterangan lisan dikemukakan dan saksi diperiksa balas atas keterangan mereka yang, akan tetapi, tidak boleh jadi dalam prosiding yang dimulakan dengan saman pemula. Walau bagaimanapun adalah paling tidak sesuai dan sangat tidak adil untuk memutuskan fakta yang dipertikaikan secara terus dengan bergantung hanya pada keterangan afidavit.

(3) Dalam kes seperti yang ini di mana fraud atau niat memfraud menjadi isu utama, butir-butir fraud mesti dijadikan pli secara khusus and adalah jelas bahawa butir-butir semacam itu tidak ada dalam afidavit pengurus syarikat responden.

(4) Perkara itu telah diputuskan dengan cara yang sangat tidak memuaskan dan secara terus dan dengan itu menyebabkan ketidakadilan serius kepada perayu.

(5) Berdasarkan pendapat mahkamah dan ketidakpastian mengenai berbagai-bagai fakta yang dikemukakan kepada mahkamah, dan memandangkan autoriti yang dirujuk, keputusan yang lebih baik ialah untuk membenarkan rayuan itu, dan mengikut A 28 k 8(1) KMT memerintahkan prosiding itu diteruskan seolah-olah ia dimulakan dengan writ dan kedua belah pihak dikehendaki menyampaikan pliding mereka menurut A 18 KMT.

Cases referred to

1 *In re Patrick and Lyon Ltd* [1933] Ch 786 (refd)
2 *Re Augustus Barnett & Sons* [1986] BCLC 170; [1986] PCC 167 (refd)
3 *Wallingford v Mutual Society* (1880) 5 App Cas 685; 50 LJQB 49; 43 LT 258 (folld)
4 *American Cyanamid v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 (folld)
5 *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (refd)
6 *Tay Beng Chuan v Official Receiver and Liquidator of Kie Hock Shipping (1971) Pte Ltd* [1987] 2 MLJ 419 (folld)
7 *Re Deadman (decd) Smith v Garland & Ors* [1971] 1 WLR 426; [1971] 2 All ER 101 (folld)
8 *Re 462 Green Lane, Ilford, Gooding v Borland* [1971] 1 WLR 138; [1971] 1 All ER 315 (refd)

Legislation referred to

Companies Act 1965 s 304(1)
Rules of the High Court 1980 O 5 r 2(b), O 18, O 28 r 8(1), O 88 r 2
Sarawak Land Code (Cap 81) s 152

Appeal from: Originating Summons No KG 144 of 1989 (High Court, Kuching)

Cecil Abraham (*KY Lin* with him) (*KY Lin & Co*) for the appellants.
Ernest Chua (*Ernest Chua & Co*) for the respondents.

Cur Adv Vult

Jemuri Serjan CJ (Borneo) (delivering the judgment of the court): In the High Court the plaintiffs, Tang Eng Iron Works Co Ltd (respondents before us) took out an originating summons under O 88 r 2 of the Rules of the High Court 1980 ('RHC') in an application under s 304(1) of the Companies Act 1965 ('the Act') seeking the following declarations:

(1) a declaration that the business of Har Lee Enterprise Sdn Bhd has been carried on with intent to defraud creditors of the defendants;
(2) a declaration that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe shall be personally responsible without any limitation of liability, for all of the debts or other liabilities of the said Har Lee Enterprise Sdn Bhd;
(3) an order that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe do repay to the plaintiffs the sum comprised in the arbitration award dated 20 May 1988 viz the sum of Malaysian ringgit four million one hundred and sixty-five thousand one hundred and forty-five and cents eighty ($4,165,145.80) only together with interest thereon at the rate of 8% pa from the date of the said arbitration award until the date of full and final settlement; costs of the plaintiffs and of the said arbitration; costs of the arbitration award taxed at $25,245.45; costs of the plaintiffs in Originating Summons No KG 156 of 1988 and judgment therein;
(4) costs of the application; and
(5) any further or other reliefs.

The learned judge held that the provisions of s 304 of the Act were satisfied and accordingly made the order in terms of the originating summons. Hence this appeal.

The circumstances under which the application under s 304(1) arose can be gathered from the facts as they were found by the High Court and from the affidavits of the parties in this case. Har Lee Enterprise Sdn Bhd ('HLE') was incorporated under the provisions of the Act on 9 December 1980 with a fully paid-up share capital of $3.6m and has a registered office at Lot 219, Section 61, First Floor, Ban Hock Road, Kuching. By an agreement dated 5 April 1984 the first defendant (first appellant before us) and one Yeh Hsin Tsan bought over all the shares of HLE for a sum of $6.4m of which $100,000 each is to be paid by Yeh Hsin Tsan, Kueh Eng

A Mong and Ting Ling Hoe; $4.1m is to be paid by the first appellant and the balance of $2m is to be paid in kind by the purchasers constructing, completing and conveying all the seven parcels of office blocks located on the eighth floor of the Jade Tower Commercial Complex to the vendors. The first and second appellants were appointed managing director and secretary of the board of directors respectively on 4 June 1984, the other B director of HLE being Hoo Tung Kwong @ Robin Hoo, Chong Kia Hoi, Sim Kwan Meng and Ngu Bek Sing who resigned on 11 June 1985 and was succeeded by Kueh Eng Mong on the same date. HLE is the registered proprietor of a parcel of land situate at Jalan Tunku Abdul Rahman and known as Lot 276, Section 48 Kuching Town Land District containing C an area of 1,516sq m which, however, is subject to a legal charge in favour of Bank Utama (M) Bhd to secure a total loan of $1,150,000. The said land is the only principal asset of HLE and valued at $4,827,872 as at 31 December 1982. However, the value of the land had been fluctuating throughout the years and as at 1 January 1987 it was valued at $10,201,833. There was a sharp down-turn in the value of the land when it was revalued D at $3,790,000 only as on 18 January 1988. The approval having been obtained from the relevant authorities for the erection of office commercial cum residential complex, to be known as Jade Tower Commercial Complex, comprising 17 storeys together with three basements, the respondents on 19 June 1984 entered into two building contracts with HLE for the E construction and completion of foundation and basement works of the proposed complex. A dispute arose between the respondents and HLE on the completion of the said works, and pursuant to the provisions of the contract the dispute was referred to arbitration in respect of the claim brought by the respondents against HLE for the work done on the said property. On 20 May 1988 the award which was in favour of the respond- F ents was published. Under the award HLE was to pay to the respondents within 14 days from the date the award was taken up by either party a sum totalling $4,165,145.80 only as well as the costs of the respondents and costs of the arbitration which were yet to be taxed, and further to reimburse the respondents with a sum of $25,245.45 being taxed and settled costs of G the award. On the application of the respondents, the High Court on 19 July 1988 ordered that the respondents be at liberty to enforce the said arbitration award in the same manner as a judgment or order to the same effect and that HLE pay the taxed costs of the application and any judgment which might be entered thereunder. The award was handed down on 20 May 1988.

H The respondents were never paid for their work. In order to seek payment, the respondents applied for the examination of the first and second appellants as responsible officers of HLE. The facts unearthed by the examination prompted the respondents to bring this application.

In the course of the examination of the first and second appellants, I pursuant to the judgment dated 19 July 1988 as judgment debtors on 14 September 1988, it was revealed that HLE on 20 December 1984 had charged the land to Public Finance Bhd for Malaysian ringgit four million ($4m). Under the memorandum of charge, the $4m loan was to be disbursed in the following manner:

(1) A sum not exceeding $1,200,000 to be released through the chargee's solicitors for the redemption of the said land from Bank Utama (M) Bhd. A
(2) The balance of the loan amount to be released progressively against construction work done up to 90% as certified by a qualified architect or consultant engineer acceptable to the chargee.

The said $4m loan under the terms of the charge was meant for the financing and construction of a 20-storey commercial/office/apartment complex. It is interesting to note that in cl 1 of the charge it is provided that the amount of the loan lent to or financed for the benefit of the chargor by the chargee by progressive releases in the manner and the terms to the extent and for so long as the chargee may in its sole and absolute discretion deem fit as set out in the First Schedule of Disbursements. The First Schedule stipulates the manner in which disbursements of the loan are to be met. The First Schedule was amended with the agreement of both parties in the following manner: B C

(1) Public Finance Berhad (PFB) shall release $1,197,460.38 to Bank Utama (M) Berhad for redemption of land titles to Lot 276, Section 48, Kuching, Sarawak, upon which we shall furnish you the undermentioned documents: D

(a) Auditor's certification that the total sales position of HLE in respect of building units in the proposed Jade Tower building is approximately $14.6m as at 14 January 1985.
(b) That notwithstanding the earlier approval of PFB to release the balance sum of the $4m loan, subsequent to the first release for redemption of the land titles, to be against 90% of the architect's certificates of construction work done, HLE undertakes to accept a revised mode of release for the balance sum to be as follows: E

(i) $1.5m shall be against the first architect's certificates of construction work done of not less than $2.38m; F
(ii) the balance sum of about $1.302m shall be against 50% of the subsequent architect's certificates of construction work done.

The examination of the appellants also disclosed that $1.5m was released by the Public Bank Bhd to the appellants but it was admitted by the first appellant that this sum of money was paid to one TR Garak ak Mud for the purpose of applying for a timber concession. It was also disclosed during the examination that an extraordinary meeting of the directors of HLE was called on 12 January 1985 to discuss and authorize the advance of $1.5m to TR Garak ak Mud for acquiring forest concession in Sarawak at which a resolution to that effect was carried. G

It is common ground that an order was obtained on 12 October 1987 by Public Finance Bhd for the sale of the said land by auction. Apparently, there was no bid on the date of the auction. It was also common ground that the said land was eventually sold to a company, Tolaz Sdn Bhd on 25 May 1988 for actually $3.5m although in its affidavit the respondents claimed that it was for $3m only. On the following day the memorandum of transfer was registered. H I

Pursuant to the provisions of the Act, HLE accordingly submitted annually its statements of accounts and these statements of accounts were produced in the court below. The statements of accounts from 1982 up to

A 1987 were produced as exhibits. A scrutiny of these statements of accounts showed that HLE commenced business on 1 January 1982, the principal activity being property development and its principal asset being Lot 276. The statements of accounts also revealed that the said land was valued at $4,827,872 as at 31 December 1982; $5,037,888 as at 31 December 1983; $7,195,557 as at 31 December 1984 and $9,685,209 as at 31 December 1985. However, as at 31 December 1986 the same land was valued at $10,201,833 and the value seemed to soar up to $11,017,570 as at 31 December 1987. At the request of the chargee, Public Finance Bhd, CH Williams, Talhar, Wong & Yeo Sdn Bhd produced another valuation report on Lot 276 on 18 January 1988 and after taking into consideration prevailing values, the size, locality and physical and legal nature of the property, it was assessed at $3.79m, a drastic downward trend in the value of this property. This is a drastic contrast to the value of the land as at 31 December 1987 and shown in the statement of accounts of HLE for the year ending 31 December 1987 and even more significantly lower than the valuation made by the same firm on 1 September 1984. It was then valued at $7m with a forced sale value of $5.6m. It is also obvious from these statements of accounts that HLE had not received any income at all throughout these years for the obvious reason that the building on which HLE expected to make profits had not yet been constructed and therefore no sales were recorded. It is not an unusual phenomenon in the property development business.

In the 1985 statement of accounts which was submitted to the Registrar of Companies in Kuala Lumpur, under current assets it was disclosed that a sum of $1,524,726 was recorded as amount owed by sundry debtors but there were no details as to who the debtors were and the amounts owing by each debtor. However, another set of statement of accounts for the year ended 31 December 1985 was produced at the hearing of Originating Summons No KG 156 of 1988 during which both appellants were examined. An amount of $184,726 was recorded as the amount owed by sundry debtors and a further sum of $1.34m by the directors of HLE. There seems to be two different versions of the 1985 statement of accounts under the heading of current assets. While the statement of accounts submitted to the Registrar of Companies in Kuala Lumpur showed a sum of $1,524,726 described as amount owed by sundry debtors, the statement of accounts produced at the proceedings in Originating Summons No KG 156 of 1988 showed the amount was split under two headings ie $184,726 being under sundry debtors while a sum of $1.34m under directors' current account. On account of the discrepancy between the two statements of accounts on the same item, an allegation was made that the directors procured for themselves the sum of $1.34m from HLE's fund when at that time HLE was already owing the respondents a sum of $4,165,145.80 which had not been paid by HLE, thereby perpetrating a fraud on the respondents. The nature and the circumstances of the payment of this sum of money was never ascertained. It was alleged by the respondents that the statements of accounts lodged with the Registry of Companies in Kuala Lumpur was doctored to conceal the fact that the sum of $1.34m was owed by the directors of HLE. It is interesting to note that at the inception of HLE a

glowing report on the property market in Kuching was presented to HLE by highlighting the huge profit of $9.5m before tax if the Jade Tower Commercial Complex were to be completed in time thus making the project a viably lucrative venture. A

Encik Cecil Abraham for the appellants took up the point on procedure and practice and submitted that the learned trial judge erred in law in dealing with the application summarily by an originating summons under O 88 r 2(1) when he should have resorted to O 28 r 8(1) of the RHC, especially in the light of the plea of fraud and the conflicting affidavit evidence. He set out instances of the conflicts of evidence in the affidavit of Encik Rex Chen Jui Yuen, the regional manager of the respondent company and of Encik Ting Ling Kiew, the first appellant. For instance, with regard to the three instances on which the learned trial judge based his decision there is conflicting evidence. In para 9 of his affidavit Encik Rex Chen Jui Yuen stated that the property was sold to Tolaz Sdn Bhd for $3m only whereas according to the memorandum of transfer dated 25 May 1988 the property was transferred to Tolaz Sdn Bhd for the sum of $3.5m. In para 11 of his affidavit Rex Chen Jui Yuen affirmed that he was perturbed by the speed with which the property was disposed of to a company ie Tolaz Sdn Bhd with an authorized share capital of only $25,000. It was transferred to Tolaz Sdn Bhd barely five days after the arbitration award was published by the arbitrator which was on 20 May 1988. However, in para 16 of his affidavit Encik Ting Ling Kiew claimed that an order for the sale by auction of the said property was obtained on 12 October 1987 and therefore the disposal of the property was not in fact carried out in haste as alleged because it was transferred more than seven months after the order of sale by auction. Similarly, on the statement of accounts of HLE for the year ending 31 December 1985 it was alleged in paras 21 to 27 of Encik Rex Chen Jui Yuen's affidavit that there was a complete absence in the statement of accounts of the sum of $1.5m advanced to TR Garak ak Mud, but according to learned counsel for the appellants it was reflected in the statement of accounts for the year ending 31 December 1987. It seems to us that the area of conflict in the statement of accounts for that year was the allegation that the set of statement of accounts for that year lodged with the Registrar of Companies in Kuala Lumpur was doctored so as to conceal the fact that the directors of HLE owed that company a sum of $1.34m which fact was disclosed in the set of statement of accounts for that year produced in the High Court during the examination of the first appellant. On the other hand, the first appellant explained in para 22 of his affidavit that according to their accountant there was a mix-up between the draft and the final and approved statement of accounts at the time the statements were filed with the Registrar of Companies in Kuala Lumpur. B C D E F G H

Apart from the various inconsistencies in the affidavits of the appellants and the respondents in the court below, we also observe other matters which have not been satisfactorily explained in the affidavits and could be resolved if the proceedings have been begun by writ. In para 28 of his affidavit Rex Chen Jui Yuen stated that the first appellant claimed in his testimony that the $3m from Tolaz Sdn Bhd being the the proceeds of the I

A sale of the said property, was paid directly towards the settlement of the moneys owing to Public Finance Bhd. However, he questioned the credibility of the testimony but made no effort to controvert it in the High Court below and, besides, the veracity or otherwise of this testimony had not been challenged. It would appear that the testimony referred to here is the testimony of the first appellant when he was examined as judgment debtor in connection with the judgment dated 19 July 1988. Considering that the said land was originally the subject of a High Court order for sale by auction under s 148(2)(c) of the Sarawak Land Code (Cap 81) and the failure of the sale, we would have thought that evidence should be adduced as to what transpired thereafter. It was not established whether the sale of the land was by private treaty with the consent of the court after the failure of the sale by auction pursuant to court order dated 12 October 1987 and no evidence was adduced either to give an account of what transpired after the auction and subsequent to the unsuccessful auction. Under s 152 of the Sarawak Land Code (Cap 81) if no bid has been made at or above the reserve price, it is lawful for the court to adjourn the sale and to order that the land be again put up for auction with the same or reduced reserve price. Thus, the circumstances under which the land was sold to Tolaz Sdn Bhd were never disclosed before the court and we are in no position to determine the validity or otherwise of the sale which, however, was never raised in the court below. What was questioned by the respondents was the haste with which the land was disposed of and the questionability of the incorporation of Tolaz Sdn Bhd and the motive for the sale, drawing thereby the adverse inference of fraudulent intent. Surely, this is good enough reason for the matter to go for proper trial, bearing in mind always that where an allegation of fraud has been made the onus is upon the person who seeks to make good the charge (*In re Patrick and Lyon Ltd*[1]) and considering also the meagre materials on this score available before the court.

Another pertinent observation is in respect of the averment of the appellants that a sum of $1.5m was paid to TR Garak anak Mud for the purpose of acquiring a timber concession. In para 18 of his affidavit Rex Chen Jui Yuen deposed that he believed that it was not official, legal or proper for a company to apply for a timber concession through a Bumiputra third party because such a ploy represented a fraud perpetrated against the Minister of Forests. Secondly, if indeed, the application had succeeded and a timber licence was issued in the name of the said Bumiputra third party, the said company would not visibly be seen to have a stake therein and thirdly, and more importantly, it would have been well-nigh impossible for creditors of the said company to trace the said company's funds to the said Bumiputra third party as the latter and the company would be separate legal entities, bearing no nexus with the said company's creditors in general and the respondents in particular. Lastly, such an exercise on the part of the said company by its very illegality was ultra vires the said company and the appellants by inveigling the said company so to act, had knowingly been parties to fraudulent trading. To this the appellants' reply was that it was within HLE's memorandum and articles of association to carry out timber business, and in view of the poor property market it would be in the interest

of HLE to go into other lines of business such as timber extraction. Assuming without deciding this is true, if the application is successful it would help to swell the company's fund which at that time was almost depleted and it seems to us to be a plausible explanation. It is more consistent with innocent intent and so no inference of dishonesty may be drawn. See *Re Augustus Barnett & Sons*[2] at p 175. The question whether the sum of $1.5m was in fact paid to TR Garak anak Mud for the purpose of securing a timber concession for HLE or for himself or whether, if assuming the timber concession was granted, HLE would be a contractor to extract timber in the concession area, could not be looked into in detail to establish the truth or otherwise of the explanation under these proceedings. More importantly, evidence is lacking and no materials are available to establish whether the application is made on behalf of HLE or on TR Garak anak Mud's own behalf and whether it is illegal for HLE to obtain a timber concession or to become a contractor in the event timber licence is granted to somebody else. What seems to be common in Sarawak and perhaps elsewhere in Malaysia is that timber licence may be obtained through a third party which may have some influence with the authorities. All things are possible and what is needed here is concrete evidence without which we do not think general inferences should be drawn from facts inferred from general averments. No discovery of HLE's memorandum and articles of association was possible in the proceedings under the originating summons which is vital to establish the fraudulent intent since there is an allegation of fraud in respect of the payment of $1.5m to TR Garak anak Mud who was never given the opportunity to testify on this matter. The matter was dealt with in a very unsatisfactory and summary manner, thereby causing grave injustice to the appellants.

The other matter that should be looked into in detail by the court entailing the presence of witnesses to be examined and cross-examined, discoveries and production of relevant documents connected therewith relates to the statements of accounts of the company ending 31 December 1985. The respondents made serious allegation against the appellants for submitting two separate statements of accounts for 1985 — one to the Registrar of Companies in Kuala Lumpur and one before the High Court in which certain material facts were suppressed. We have earlier on adverted to the items in the two statements of accounts which were claimed to be inconsistent and the allegation of the suppression of material facts therein. The appellants explained how this apparent inconsistencies occurred, but unfortunately the accountant who prepared the statements of accounts was never asked to file an affidavit to depose to the true circumstances under which the inconsistencies came into existence. It was only the first appellant who in his affidavit claimed that the accountant, one Mr Wong Siew Chow of Wong Siew Chow & Co, certified accountants, approved company auditors, first sent a draft account to HLE and then he drew up a final account and there was a mix-up between the draft account and the final account during the filing with the Registrar of Companies. (See para 22 of the first appellant's affidavit at p 80 of the record of appeal.) In an ordinary proceeding commenced by a writ Mr Wong Siew Chow would definitely have to be subpoenaed to give evidence on such an important matter as an

A allegation of fraud or fraudulent representation because it is only he who could explain what actually happened. An inference on facts which themselves could not therein be established as proved is in our view not justified. As Hoffman J said in *Re Augustus Barnett*[2] at p 175:

> ... An intention thus qualified is not an adequate basis for a belief that there is
B good reason for thinking that funds will become available to pay the company's debts as they fall due and can therefore give rise to an inference that there was an intent to defraud — see *R v Grantham* [1984] 3 All ER 166, [1984] BCLC 270, [1984] QB 675. I do not accept this form of reasoning, which involves translating the actual facts pleaded into generalities and then drawing inferences from those generalities rather than the facts themselves.

C It would appear that the respondents relied firstly, on the affidavit of Rex Chen Jui Yuen, the regional manager of the respondent company, which in itself does not, in our view, adequately contain all the evidence of the carrying on of the business of HLE on the part of the appellants with intent to defraud their creditors, and secondly, on the impugned statements of
D accounts and drew adverse inference therefrom of fraudulent intent. In other words, from the viewpoint of the respondents the statements of accounts speak for themselves as to the truth therein without the necessity of further proof, being themselves in the nature of intrinsic evidence. We are not disposed to agree with such a sweeping general proposition for the purpose of establishing intent to defraud on the part of the appellants.

E Unquestionably, these conflicts in the evidence can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined on their evidence which, however, is not possible in proceedings begun by originating summons. To add to the uncertainty of the facts the deponents of both affidavits of the appellants and the respondents were not
F cross-examined to ascertain the veracity or otherwise of their evidence. It would seem that both parties were contented to rest their case on their affidavits only where such affidavits do not unequivocally bear testimony conclusively and positively to the various allegations but are themselves open to more than one interpretation. In such a case as the present where fraud or intention to defraud is the central issue we agree that the particu-
G lars of fraud must be specifically pleaded and it is obvious that the particulars of the fraud are absent in the affidavit of the manager of the respondent company. On this point we find strong support in the case of *Wallingford v Mutual Society*,[3] particularly in the speeches of Lord Selborne (Lord Chancellor), Lord Hatherley and Lord Watson. Lord Selborne said at p 697.

H > With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged
I to be fraudulent ...

At p 701 Lord Hatherley said:

> There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that

> the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

Lord Watson is more specific and at p 709 he said:

> My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of common law, I think the terms of O XIV would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.

In any case it is most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence and in this respect we would echo the words of Lord Diplock in *American Cyanamid v Ethicon Ltd*[4] at p 407:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

The same law Lord spoke in almost similar vein in *Eng Mee Yong & Ors v V Letchumanan*[5] at p 216:

> Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.

Encik Ernest Chua, counsel for the respondents, in reply submitted that O 28 r 8(1) was not relevant and that the proceedings were correctly commenced under O 88 r 2(1), arguing that there was nothing in O 88 r 2(1) which required that proceedings under s 304(1) be begun by writ. In his view the learned judge had considered O 28 r 8(1) but it was clear that it did not appear to the learned judge in the proceedings before him that the matter should be continued as if it had been begun by writ. In other words, his argument was that the learned judge had considered O 28 r 8(1) but decided not to exercise his discretion to order the proceedings to continue as if they had been begun by writ. We are, regrettably, unable to share this view with the same gravity because, having regard to the various unsatisfac-

tory aspects of the case that we have alluded to in detail earlier on, the better discretion to exercise is for the learned judge to order the proceedings to continue pursuant to O 28 r 8(1).

While we accept Encik Cecil Abraham's submissions that from the point of procedure and practice and for the reasons we have explained above this is a proper case for the application of O 28 r 8(1) we do not, however, lend countenance to his submission that we should apply the principle laid down in the English Companies (Winding-up) Rules 1948 nor their successor the Insolvency Rules 1987 for obvious reasons.

We were referred to the case of *Tay Beng Chuan v Official Receiver and Liquidator of Kie Hock Shipping (1971) Pte Ltd*,[6] a Court of Appeal case which principally lays down a ruling that where a trial judge was wrong in the exercise of his discretion under O 28 r 8(1) when he failed to order pleadings, discovery and a full trial on the merits but heard the application under s 305 of the Singapore Companies Act (Cap 50, 1990 Ed) summarily, thereby resulting in an injustice or a miscarriage of justice the Court of Appeal would interfere if clearly satisfied that the decision was wrong so as to defeat the rights of the parties altogether and would be an injustice to one or the other. In that case the Singapore Court of Appeal having regard to all the circumstances of the case ordered, pursuant to the Rules of the Supreme Court 1970 O 28 r 8(1), the proceedings to continue as if they had been begun by a writ of summons and the parties hereto deliver pleadings in accordance with O 18.

In dealing with the question of procedure and practice in relation to O 28 r 8(1) the learned judge in the court below seemed to take the view that since HLE had not been wound up the appropriate order to apply is O 88 r 2(1), relying on a passage at p 625 of Walter Woon's book entitled *Companies Act of Singapore: An Annotation*. The passage reads:

> Where the company is not being wound up an application under this section should be made by originating summons: Rules of the Supreme Court 1970 O 88 r 2(1).

Probably the learned judge was also persuaded to take that view because the first appellant in para 3(d) of his affidavit stated that there was no provision either under the Act or the RHC that the respondents could commence this action by originating summons. The learned judge is correct in quoting O 88 r 2(1) of the RHC in answer to the appellants' argument on that score but in our view he is not precluded in the exercise of his discretion from making an order that the proceedings should be continued as if begun by writ pursuant to O 28 r 8(1) bearing in mind also O 5 r 2(b). Indeed, it is within his absolute discretion and he is justified to do so in the circumstances of this case in order to resolve the conflicts of affidavit evidence and reach a well-balanced decision.

In this respect it is illuminating to refer to the case of *Re Deadman (decd) Smith v Garland & Ors*.[7] The plaintiff by an originating summons sought to determine the question whether the gift of residue to the third defendant, the testator's other daughter, was satisfied or adeemed wholly or pro tanto by a gift to the third defendant of certain securities made by the testator

during his lifetime soon after making the will. When evidence was sworn certain facts came to light, and as a result it was sought to amend the summons by adding, inter alia, an allegation of undue influence. The amendment also sought necessary consequential orders, including an order under RSC O 28 r 8. On the third defendant's objection on the ground that since the proposed amendments amounted to allegations of fraud the action should be begun by writ pursuant to O 5 r 2(b), it was held that assuming that the action as amended would be one based on an allegation of fraud it would become an action which had to be begun by writ pursuant to RSC O 5 r 2(b), but that rule did not prevent an action begun by originating summons from being continued, under O 28 r 8, as if begun by writ where the original proceedings were amended to include an allegation of fraud; and, accordingly, the amendment should be allowed and the action continued as if commenced by writ.

At p 429, Stamp J expressed his view on the purpose of complying with O 5 r 2(b) of the RSC where a claim is based on allegation of fraud in the following words:

> ... The whole point of insisting that certain proceedings, and more particularly proceedings involving or based on an allegation of fraud, shall be begun by writ is to ensure that the procedure consequent upon the issue of the writ involving pleadings, discovery and so on, is followed.
>
> If I allowed the amendment which is sought upon the terms of the action continuing as if it had been commenced by writ, I would accomplish precisely that result.

In an earlier case where fraud was alleged although relied on as an alternative, Ungoed-Thomas J took even a more stringent view on the application of O 5 r 2(b) and refused to allow the proceedings commenced by originating summons to continue as if begun by writ pursuant to O 28 r 8(1). See *Re 462 Green Lane, Ilford, Gooding v Borland.*[8] The brief facts of that case are as follows. The plaintiff, Edwin Julian Gooding, of 462, Green Lane, Ilford, Essex ('the proprietor') was registered on 2 December 1962, as the proprietor of the freehold land known as 462, Green Lane, Ilford, comprised in title No EX 42887 ('the land'). On 15 March 1968, a caution was registered under s 54 of the Land Registration Act 1925, in favour of the defendant, Ernest Courtney Borland, of Bedford Hill, London, SW ('the cautioner').

The cautioner in his statutory declaration in support of his caution declared that on 19 January 1968, a contract for the sale of the land was made between the proprietor and himself and that he had paid £247 3s to the proprietor.

Pursuant to r 218 of the Land Registration Rules 1925, the proprietor applied for notice under s 55 of the Act of 1925 to be served for warning-off the cautioner. The notice was served and the cautioner objected to the cancellation of the caution.

On 30 September 1968, the Chief Land Registrar made an order under RSC O 93 r 10 and r 220(4) of the Rules of 1925 requiring the proprietor to take out, within eight weeks of the date of the order, an originating

summons for bringing the matter before the court and, in particular, for determining whether the caution should continue to have effect or be cancelled.

On 14 November 1968, the proprietor took out the present summons. In his evidence the plea of non est factum was taken in respect of the contract; in the alternative he alleged fraud based on the same facts.

On 26 October 1970, when the matter came on for hearing, Ungoed-Thomas J raised the point whether, bearing in mind the allegations of fraud and the provisions of RSC O 5 r 2, the proceedings could be commenced by an originating summons and whether, in view of RSC O 28 r 8, the proceedings could be ordered to continue as though commenced by a writ.

At p 140 the learned judge expressed his view thus:

> In those circumstances, therefore, in this case there must be pleadings; there must be discovery; the action must be at least continued as though it had begun by writ. ...
>
> This is not a technicality; it is a most important matter of substance because it is only by this means that the parties can see perfectly clear what are the serious issues involved and be sure of having made available to them by discovery all the relevant documentary evidence which generally plays such an important part in these cases. Commencing the proceedings by writ would in the circumstances of this case involve only the very small additional expenditure of issuing the writ, and on the rules as they stand it seems to me that the requirement does exist that where, as here, there is an allegation of fraud, the proceedings must be so started and cannot be continued as though commenced by writ when in fact commenced by originating summons.

However, Stamp J in *Re Deadman (decd)*[7] disagreed with the learned judge because he thought Ungoed-Thomas J's attention was not drawn to O 2 r 1(3) which provides:

> The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

At p 429 Stamp J expressed his view on this matter in the following words:

> The existence of this sub-rule does, I think assist me to come to the conclusion that the inclusion now of a claim which would have required the action to have been brought by writ is not fatal to the continuance of the action. To some extent this has led me to come to the conclusion which I have expressed.

With respect, we agree wholly with Stamp J's observation in *Re Deadman*'s case[7] and his comments on Ungoed-Thomas J's decision in *Re Green Lane*'s case[8] and in our view his ruling in *Re Deadman*'s case[7] is relevant and equally applicable to the present case just as *Tay Beng Chuan* 's case is similarly applicable in so far as it describes that the procedure under O 28 r 8(1) is the appropriate procedure to adopt in the case such as ours. Since it is our view that the point on procedure and practice is the dominant and crucial issue in this appeal and would conclusively decide the result of this appeal, it would not be necessary for us to deal with the other grounds of

appeal relating to the substantive matters which are the subject of the proceedings in the High Court.

We have given anxious consideration to the facts of this case and submissions of both counsel on the point under discussion, and in the light of the view that we have taken and the uncertainties of the various facts as they are made available before the court, and in view of the authorities cited above, we have come to the conclusion that the better decision under the circumstances is to allow the appeal, and pursuant to O 28 r 8(1) order the proceedings to continue as if begun by writ and the parties to deliver their pleadings in accordance with O 18 and that the order made by the learned judge should be set aside.

The appellants are awarded costs of this appeal but the costs in the court below are to abide by the result of the fresh hearing which should be dealt with by another judge.

Appeal allowed.

Reported by Prof Ahmad Ibrahim